

IN THE UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF TENNESSEE
NASHVILLE DIVISION

PATRICIO JARA,)
)
Plaintiff,)
)
v.) 3:20-cv-00131
) JUDGE RICHARDSON
)
TENNESSEE STATE UNIVERSITY,)
)
Defendant.)
)
)

BEFORE THE HONORABLE ELI J. RICHARDSON, DISTRICT JUDGE

TRANSCRIPT OF PROCEEDINGS

NOVEMBER 4, 2022

TRIAL VOLUME IV of IV

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The above-styled cause came on to be heard at 9:23 a.m. on November 4, 2022, before the Honorable Eli J. Richardson, District Judge, when the following proceedings were had, to-wit:

THE COURT: All right. We are here for Day 4 of trial in *Jara vs. Tennessee State University*. Getting a late start because there was a motion filed this morning, plaintiff's motion to modify jury instructions and verdict form.

Has the defendant had an opportunity to review this?

MS. CARTER: Yes, Your Honor. We got a copy from the Court when we got here.

THE COURT: All right. Have you been able to form an opinion on your view about this?

MS. CARTER: We can speak to it.

THE COURT: Okay. All right. Let me make a few comments and we'll go from there. The first thing that I want to note is this: One thing about this, the defendant is referred to as the (capital G) government, and that's problematic. In federal litigation, I'm just going to say every single time capital G is referenced, the proper reference is only to the United States of America. And I do

1 think it's not -- in this case, it's not just sort of a
2 formalism thing. I do think federal judges, if you say "the
3 government," they going to think you're referring to the
4 federal government, period, and not an agency of a particular
5 state.

6 But substantively, this matters because the EEOC's
7 guidance is federal guidance. It is not the State of
8 Tennessee's guidance, and it's certainly not TSU's guidance.

9 Would you agree with that, Mr. Bigelow?

10 **MR. BIGELOW:** Your Honor, I would -- I will --
11 first of all, I appreciate the -- I obviously did not realize
12 that; otherwise, I wouldn't have done that.

13 **THE COURT:** Yeah. And I don't mean to -- you
14 know, I don't mean to sound like the smartest guy in the room
15 on that, but I do think it's a heads-up, and I think it will
16 be a helpful heads-up in the future but -- for you.

17 But on the substantive piece, right, this is
18 Tennessee State University's guidance, the EEOC's guidance.

19 **MR. BIGELOW:** I believe it is. In fact, the --
20 TSU has an EEOC office that follows EEOC procedures and
21 investigates based on the -- I mean, it's actually called the
22 EE -- I believe --

23 **THE COURT:** But you cited me something from the
24 EEOC, right?

25 **MR. BIGELOW:** That's correct.

1 **THE COURT:** So it's from the EEOC, right? It's
2 not Tennessee State -- now, if you'd have cited me something
3 from a TSU document, then I might say, well, it's their
4 guidance although even then, we could probably parse through
5 it and say it's just TSU passing on the EEOC's guidance.

6 But here, the only thing we have is a citation to
7 the EEOC. And so I think, you know, whatever the merits of
8 your argument here -- and I think there is none, but we'll
9 talk about that.

10 But, you know, I just am concerned that in
11 addition to making your argument, you're like, you know,
12 treating the defendant like it's gone against its own
13 guidance. And I think that that's not a fair way to put
14 this. You know what I mean?

15 Like, if you want to make your argument, I think
16 that's great, but when you're accusing a party of, quote,
17 ignoring its own guidance, better be careful. And I just
18 don't see where this is Tennessee State's own guidance. I
19 mean, it's EEOC guidance.

20 **MR. BIGELOW:** Your Honor, I believe that the --
21 which is why I made the argument, obviously -- that they
22 followed -- that Tennessee State University follows the
23 EEOC's guidance. Now, I suppose I should have put in
24 document --

25 **THE COURT:** But they're -- like, if they're

1 following the guidance, then I -- you know, it's probably
2 because they kind of feel that they have to do so. But it's
3 still the EEOC's guidance, right?

4 Now, if you had cited me to something that really
5 was a TSU document, okay, so -- and I don't think we need to
6 spend more time on that; I'm just kind of a little bit
7 concerned. I just didn't see where we had any guidance put
8 out by the defendant where they should be, you know,
9 upbraided for ignoring their own guidance.

10 But be that as it may, there still is a
11 substantive issue, and we'll talk about that and give each
12 party their say.

13 What's the defendant's take on this?

14 **MS. CARTER:** We have a few points, Your Honor.

15 This idea of perception and perceiving a specific
16 person as foreign-born, if plaintiffs are going to argue
17 this, I would have expected to hear these types of questions
18 through the trial for the witnesses.

19 **THE COURT:** And, of course, it's too late for them
20 to argue anything right now, right?

21 **MS. CARTER:** Correct.

22 **THE COURT:** So they don't get to argue anything.
23 It's only a question of what should go in the jury
24 instructions based on the law and what's happened, but go
25 ahead.

1 **MS. CARTER:** So I think it would be highly
2 prejudicial. At this point, the jury instructions include
3 what it appears plaintiff is attempting to argue, which is
4 Jury Instruction No. 2 speaks to the jury's duties. Jury
5 Instruction No. -- I can't remember if it's 4 or 6 now; I
6 apologize. I think it's 6 talks about attorneys' statements
7 not being evidence.

8 And, you know, the verdict form has already been
9 submitted to the jury. Obviously, it's highly prejudicial if
10 we change the wording of the jury verdict at this point. It
11 draws a -- it highlights, perhaps, something that the jury is
12 going to look at and go, oh, maybe we should be doing this.

13 Counsel, throughout his argument to the jury in
14 closing argument, talked about common sense and what the jury
15 should do with the evidence.

16 He hasn't told the jury anything about perception.
17 There is nothing that has been raised in this case using the
18 word "perception," but he has used that throughout his case.
19 So the defendant's position is this is not -- that the jury
20 instructions should stand as they are to the jury. The jury
21 was told to use their common sense. We believe they will do
22 that.

23 There is nothing here that talks about -- or, you
24 know, the jury instructions about treating government and
25 individuals equal, speaks to counsel's argument about them

1 believing my statements which, again, are not evidence in the
2 case over counsel's case.

3 And, you know, more importantly, I think this is
4 kind of late at this point. If he had a question about
5 anything that I said to the jury, the time to have raised
6 that would have been in rebuttal. They get the last word.
7 So this is all about oral argument to the jury, which is not
8 evidence in the case and which is not going to be considered
9 by the jury as evidence in the case.

10 And again, I just think it's really prejudicial.
11 Counsel wanted to use the verdict form as it was. If he had
12 an issue with it, then it should have been changed before it
13 got published to the jury.

14 **THE COURT:** All right. Thank you.

15 I have a few thoughts. First of all, I absolutely
16 believe this is too late. And if it was necessary to -- I'll
17 allow Mr. Bigelow an opportunity to change my mind. It would
18 be one thing if the instructions as written were wrong. No
19 one thought they were wrong. At best, this proposal would be
20 sort of an optional addition. But it's nothing in there is
21 wrong as stated, nothing. And making sort of an optional
22 change after counsel have, you know, made their arguments
23 based on what we had already, I think it is prejudicial.

24 Why would this not be too late, Mr. Bigelow?

25 **MR. BIGELOW:** Your Honor, in -- my argument is

1 this: In both defendant's Motion for Summary Judgment and,
2 frankly, in defendant's opening, there was no focus on this.
3 This focus was done literally --

4 **THE COURT:** What focus?

5 **MR. BIGELOW:** The focus on actually proving --
6 granted, we proved that Dr. Jara, that defendant knows
7 Dr. Jara is not from -- born in the United States. We have
8 proven that. But their argument is that we haven't proven
9 that the defendant knows all the -- where these other people
10 are from, which --

11 **THE COURT:** But your instructions don't say
12 anything about that one way or the other, right? They
13 don't -- they don't give any instructions about, you know,
14 about how to view all these other professors and how they
15 were treated that you had made part of your case. They don't
16 say anything about that.

17 So adding actual or perceived, the instructions
18 don't address the point that you're making which is about,
19 you know, the relevance of the other professors. The
20 instructions are all about whether the plaintiff was subject
21 to discrimination based on national origin. And they don't
22 have any applicability to, you know, the arguments related to
23 other professors who supposedly were in the same boat.
24 That's the way I see it. But --

25 **MR. BIGELOW:** Fair enough, Your Honor.

1 **THE COURT:** You know, but like here's -- and
2 here's what I mean, and I'm going to -- let me back up for a
3 minute. I do think on the issue of sort of it being late, I
4 think we all had -- you know, we had a few discussions about
5 this language. Most of the language, even with all the
6 changes I proposed and made, almost all of it came, you know,
7 from the -- you know, from the parties or, at least, a lot of
8 it did. No one was sort of focused on that. And I do think
9 if there was a problem on the issue of, you know, the jury
10 not understanding that perceived rather than actual national
11 origin could have a role in this case, that could have been
12 brought up on closing.

13 But here's what I mean when I say the instructions
14 are about the -- whether the plaintiff was discriminated
15 against based on national origin. And here's the thing:
16 There -- all right. Let's look at it. So Title VII provides
17 that it shall be an unlawful employment practice for an
18 employer -- reading from page 13 -- you know, to discriminate
19 based on national origin.

20 We're talking about whether there was unlawful
21 employment discrimination against Dr. Jara based on national
22 origin.

23 We're not talking about whether, you know,
24 other -- and that's the issue in this case. It's not whether
25 other professors that, you know, the plaintiff wants to throw

1 into the mix to support the notion that the plaintiff was
2 treated badly on national origin, the jury instructions are
3 not about whether those people were discriminated against
4 based on national origin. It's about -- they talk about what
5 the plaintiff must prove, and the statement in there is
6 accurate.

7 The next one there, there's another reference to
8 national origin in terms of what Title VII provides that's
9 accurate.

10 Then there are further instructions on page 13
11 defining national origin.

12 Page 15: "To establish a claim of discrimination
13 based on national origin." It doesn't speak to -- so in
14 other words, at this point, that instruction is saying here
15 is what the plaintiff needs to prove to establish a claim of
16 discrimination based on national origin. It does not speak
17 to whether the jury can be suspicious of TSU and how they
18 treated Dr. Jara based on perceived, rather than actual
19 national origin of other professors. It just doesn't speak
20 to that.

21 So that -- that's why I wouldn't -- that's why I
22 don't think it needs to go in there to support your argument
23 about other professors.

24 As to Dr. Jara, I have a few things to say, and I
25 will let you speak when I'm done here. But a few things:

1 First of all, the notion of mere perception of national
2 origin is not even applicable to Dr. Jara, right? Because he
3 actually has the national origin that places him in a
4 protected class. This isn't one of these cases that the EEOC
5 is speaking to where someone is discriminated against because
6 of perceived national origin rather than real national
7 origin.

8 That would be the case, you would want to rely on
9 that principle if Dr. Jara was saying, look, I'm
10 American-born but they perceive me as not American-born, and
11 it's no defense that they were wrong that I was not
12 American-born, because being discriminated against based on a
13 perception that I'm foreign-born is just as bad as
14 discriminating against me based on the true fact that I'm
15 foreign-born.

16 And that just doesn't apply in this case. That's
17 the way I see it. But you may try and change my mind on
18 that.

19 **MR. BIGELOW:** I will briefly do my best to do
20 that, Your Honor. My point was this: For the first time
21 that I heard of -- and I may be wrong -- yesterday evening at
22 close, a lot of defendant's argument was based around the
23 argument that defendant doesn't know that the, quote,
24 internationals were actually internationals; not Dr. Jara,
25 but the internationals, the group of other professors who are

1 looked upon by some, as the testimony showed, as
2 internationals.

3 Now, on page 14 of the verdict form -- of the jury
4 charge, it says: "Someone who is not born in the United
5 States is a member of a protected class for purposes of both
6 what I will call a general discrimination claim and a hostile
7 work environment claim under Title VII."

8 **THE COURT:** The jury doesn't have to decide
9 whether anyone else was a member of a protected class to
10 render a verdict in favor of Dr. Jara.

11 **MR. BIGELOW:** That is true.

12 **THE COURT:** All right.

13 **MR. BIGELOW:** But my contention, plaintiff's
14 contention, is that someone who is not born in the United
15 States or someone who is perceived as not being born in the
16 United States is a member of a protected class. That is --
17 that is our contention and -- that's our contention.

18 **THE COURT:** Okay. Well, and, you know, I -- I
19 think -- and I do understand that. And actually, I have a
20 few comments about that, that I'm going to make in a minute,
21 whether that perception is true or not because it's
22 debatable.

23 But, you know, the -- and I'll explain why I say
24 it's debatable whether the perceived national origin is as
25 good as, you know -- whether discrimination based on

1 perceived national origin is as actionable as discrimination
2 based on actual national origin. But for now, I'll assume
3 that that's accurate.

4 I do think we have accurate instructions, and to
5 the extent -- and everyone agreed on them. To the extent I
6 guess they could have been more specific by saying actual or
7 perceived, that doesn't matter here because we have a case
8 where the claim is not that he was discriminated against
9 based on perceived national origin, it's actual national
10 origin. Right?

11 Like, in other words -- see if you agree and I'm
12 happy to have this discussion. So in other words, like, this
13 is a case where he has a foreign national origin. I guess on
14 the Dr. Jara piece, it sounds like your position is, look,
15 it's no defense -- and maybe this is what you're saying:
16 Like, it's no defense if they perceived him -- maybe what
17 you're saying is it's no defense to a claim that they
18 discriminated against him based on national origin to say
19 that they merely perceived him to be foreign-born without
20 actually knowing. Is that your argument?

21 **MR. BIGELOW:** That's absolutely -- in fact, to
22 that point, Your Honor, my argument is if Dr. Jara's parents,
23 who are from Chile, were flying over the United States on a
24 trip, and they just happened to stop when his mother was nine
25 months, you know, pregnant, and they just were happened to

1 fly into Canada and happened to stop in the United States and
2 he was actually born in the United States, then they went on
3 to Canada for their vacation and flew back to Chile, well,
4 that analysis would hold here. Like, it wouldn't matter if
5 he was actually born in the United States or not.

6 **THE COURT:** Well, but if we look at this case, you
7 know, all this, I think, goes to the third element of
8 discrimination based on national origin. His national
9 origin, which everyone knows that his national origin is
10 foreign-born, right? Everyone knows that. So his actual
11 foreign origin. So was a motivating factor. The jury knows
12 that they need to find that his actual -- you know, here, it
13 says national origin. He does have the actual national
14 origin being foreign-born. Was a motivating factor.

15 Isn't it not built into that notion that if they
16 perceived him -- if they correct -- because if they perceived
17 the national origin, if TSU perceived the national origin, it
18 would be an accurate perception. So his national origin was
19 a motivating factor.

20 I think that encompasses the notion his national
21 origin was -- it can't be a motivating factor unless they
22 knew or perceived. Like, if they perceived it, it could be a
23 motivating factor, right? Like no one said they have to
24 know. Now, you're saying the defendant said that they had to
25 know. I'm not sure they said that. We'll talk about it in a

1 minute. So maybe if we boil this down.

2 His national origin, foreign-born, was a
3 motivating factor. A perception of what his national origin
4 is rather than knowledge would be enough to be a motivating
5 factor, and I think the jury would figure that out. So
6 there's nothing in this instruction that tells them that the
7 defendant need to actually know his national origin. Because
8 a perception, human nature, everyone knows a perception of
9 something can motivate actions even if people don't know.
10 Right?

11 And I think -- I think you argued it just fine.
12 And again, no one thought it was important, and I guess
13 you're saying, well, I didn't know until they argued this. I
14 didn't know the need for the instruction.

15 But, I mean, I would think that would sort of -- I
16 mean, it would have always been on the table that the
17 defendant would say, well, we didn't know the national
18 origin. I mean, didn't you have discovery in this case? I
19 mean, like, is it a surprise to you that TSU's witnesses just
20 said I didn't know their national origin. Is that a surprise
21 to you? You know what I mean? Like, because if it wasn't,
22 this sort of thing really needed to be accounted for on the
23 front end.

24 **MR. BIGELOW:** I guess, Your Honor, a better
25 application is the list that I talked about in front of the

1 jury.

2 **THE COURT:** Uh-huh.

3 **MR. BIGELOW:** I do not believe that based on case
4 law -- not only the EEOC guidance but also based on case law,
5 that it matters whether the list of Dr. Najarian [phonetic]
6 and Kothahanden [phonetic] -- like the long -- like Dr. --
7 may I, Your Honor?

8 **THE COURT:** Yeah.

9 **MR. BIGELOW:** I don't believe it matters that the
10 list of Sathananthan, Badamdorj, and Jara, whether we can --
11 I don't think we needed to prove necessarily that
12 Sathananthan and Badamdorj were foreign-born professors.
13 They could be perceived of as --

14 **THE COURT:** To this day, I don't know that they
15 were foreign-born, and I don't see any evidence that they
16 were perceived as foreign-born. Was there a stitch of
17 evidence that anyone there was perceived as foreign-born?

18 **MR. BIGELOW:** Absolutely.

19 **THE COURT:** What was it?

20 **MR. BIGELOW:** People saying that those professors
21 need -- and they call them the internationals.

22 **THE COURT:** Were those professors mentioned by
23 name as falling into that category?

24 **MR. BIGELOW:** Absolutely, yeah.

25 **THE COURT:** Like, do you recall -- I don't

1 recall -- like -- believe me, and I don't mean to dispute it
2 if you could point me to it, but I don't remember a witness
3 saying, "You know what? The reference to 'they who need to
4 speak better,' that -- you know, that was a reference to
5 Dr. So and So and Dr. So and So."

6 I don't recall that, but maybe you can refresh my
7 memory.

8 But again, why didn't this come up in rebuttal?

9 **MR. BIGELOW:** That's fair. I'll stop. That's
10 fair.

11 **THE COURT:** Yeah. I mean, I do want you to -- and
12 really, I am happy to have further discussion. But as I
13 think you can tell, I'm sort of, you know, I think,
14 struggling with these things.

15 I do think that if on the front end this had been
16 addressed, we could have had a discussion. Maybe -- maybe
17 some language could have been included. But I think what we
18 have is right. And making changes after closing to change
19 instructions that are correct, even if, you know, they could
20 be done a little differently, I really think it's
21 problematic. And I do -- you know, if you have -- I would be
22 interested if you have evidence saying, "The names on this
23 list were the people specifically targeted by those
24 comments," as opposed to the notion that, "Hey, there's a
25 group of internationals who need to improve their speech."

1 I didn't -- I didn't pick up a reference in the
2 testimony or don't recall a reference in the testimony to any
3 particular person being referred to as targeted by those
4 comments.

5 **MR. BIGELOW:** My argument before the Court, I
6 believe, and in court was that I asked Dr. McMurray if he
7 noticed any difference between the list that includes those
8 professors who I just mentioned and the list of people like
9 Jones and Smith or what have you. And he said: No, I don't
10 see any difference between the two.

11 And that's a matter of fact admittedly. He may
12 not. We don't believe that, but he may not in reality see
13 any difference between the two or recognize a difference
14 between the two.

15 But our point is that whether they are actually
16 born elsewhere or not, it's a matter of perception. And I
17 know like you said, that's the point. I'm not just making
18 this up and saying it hasn't been argued; it has been argued.
19 I didn't realize that defendant was going to stand up and
20 say, hey, it doesn't matter if they were actually born here
21 or not. There's no proof that they were not born here.

22 And I guess plaintiff's point, while it's -- you
23 know, admittedly I guess a little minutia, is not whether
24 they were actually born here or not, it's what they could --
25 were perceived.

1 I mean, he works with them. Dr. Jara testified
2 that a number of -- he and a number of other, quote,
3 foreign-born professors, and mentioned names, had, you know,
4 gathered together and complained about things. And that's my
5 point.

6 **THE COURT:** Well, here's -- here's the way I see
7 it. I think what you're referring to here is, you think the
8 jury should be able to infer that people on the one list were
9 treated worse and that they were perceived as foreign-born;
10 and that if those two things are true, that they were treated
11 worse and perceived as foreign-born, that helps Dr. Jara's
12 case because it would tend to indicate the kind of animus
13 against foreign-born folks.

14 These instructions give the jury plenty of
15 latitude to do exactly that even without your proposed
16 additions. They really do. Like, when I read this, I'm --
17 like, for example, on the key element, "His national origin
18 was a motivating factor," nothing in there that could prevent
19 the jury from saying something like this.

20 **MR. BIGELOW:** Fair enough, Judge. Thank you.

21 **THE COURT:** Yeah. And I'll make a couple more
22 comments about that and then move to a slightly different
23 topic.

24 But they definitely have room to say, you know
25 what? When we're considering whether national origin was a

1 motivating factor, we're going to consider the names on that
2 list, and frankly, it would be sheer speculation. It would.
3 But they -- but that's to the plaintiff's benefit. They
4 actually have room to speculate if they want, because I can't
5 stop them. Even if, as judges, we don't like speculation,
6 whatever, you can't stop. They can go in the jury room and
7 say: You know what? We speculate that the people on this
8 list were perceived as being foreign-born.

9 And that would really -- in the United States in
10 2022, I don't think that's a safe assumption. But they have
11 the perfect leeway within these instructions to go along with
12 that argument and say: Yep, yep, we're suspicious about why
13 these people were treated differently. We think it could be
14 because they were perceived as foreign-born, whether or not
15 they were actually foreign-born. And that is going to
16 contribute to a finding on our end that Dr. Jara's national
17 origin, which is undisputed, was a motivating factor.

18 I think there's plenty of leeway, and I think you
19 made the argument for them to accept it if they want it.

20 I think you're sort of -- part of what you're
21 saying, Mr. Bigelow, I think, is that there was something
22 that the defendant referred to in terms of the law that was
23 sort of misleading that would indicate to them that they
24 can't do that.

25 I don't see it that way. I did --

1 Do you think that you imply that the law requires
2 for Dr. Jara to be liable, the law requires that TSU knew the
3 national origin of particular professors?

4 **MS. CARTER:** No, Your Honor. I don't think that's
5 what the defendant was implying at all.

6 **THE COURT:** I took it more like this, Mr. Bigelow,
7 and I know that -- and I appreciate you're like, "Well, I'm
8 done. I've made my peace," and I'm the one going on, so I
9 realize that. But I do want you to know that in the limited
10 time I had, I thought about -- I continue to think about your
11 argument.

12 But, like, to me, it was more like, you know
13 what -- the argument sounded to me more like: You know what?
14 Mr. Bigelow's gotten up and he said, you know, hey, listen,
15 the people on this list, you know, I thought it was more like
16 they were foreign-born rather than they were perceived as
17 foreign-born.

18 But either way, whichever way you were arguing --
19 maybe you were arguing it both ways -- that they were
20 foreign-born and treated differently or they're at least
21 perceived as foreign-born and treated differently; the state
22 gets up and says: You know what? You should reject that,
23 and one of the reasons you should reject it is that there's
24 no evidence that anyone knew it.

25 I didn't see them -- I didn't hear them say: And

1 without actual knowledge of these other professors' national
2 origin, the law requires that you return a verdict for the
3 defendant.

4 So that's how I see it. I --

5 Yes, sir?

6 **MR. BIGELOW:** I suppose one of the reasons why I
7 believe that, Your Honor, is because of what I believe to be
8 the rationale of the defendant's Rule 50 motion, which I
9 thought was based on that, which --

10 **THE COURT:** Well --

11 **MR. BIGELOW:** And I may be wrong about that, but
12 that was my understanding of it.

13 **THE COURT:** Well, then we get -- so then we get
14 back to -- and their Rule 50 motion, I'm confident, doesn't
15 relate to the national origin of any other professors.
16 It's -- has something to do specifically with the third
17 element as it relates to Dr. Jara's national origin. Fair to
18 say?

19 **MS. CARTER:** Yes.

20 **THE COURT:** Okay. Are you saying that as a matter
21 of law, Tennessee State can't be liable unless they knew,
22 or -- that's Option A -- Option B is: There is not
23 sufficient evidence that national origin was a motivating
24 factor. And a big reason to believe there isn't sufficient
25 evidence that it was a motivating factor is the lack of

1 evidence that they knew, that lack of evidence that anyone
2 knew -- any decision-maker knew his national origin advances
3 the ball pretty far down the field as to whether national
4 origin was a motivating factor such that the state would have
5 to rely on inferences that he was correctly perceived as
6 being foreign-born and that -- that inference cannot be drawn
7 based on this evidence. That's --

8 **MS. CARTER:** Yes, Option B.

9 **THE COURT:** Option B. And I don't mean to make
10 your argument for you. But I will say this: Mr. Bigelow is
11 right because, you know, if it's based on the lack of
12 knowledge -- and I don't think I heard you say if the
13 defendant didn't know the jury -- the instructions the Judge
14 gives you means that the defendant can't be liable. I took
15 it as a more holistic reason, set of reasons, as to why
16 national origin was not proven to be a motivating factor and
17 not just, well, they got no knowledge. That's the end of it.
18 That's the way I took it.

19 **MS. CARTER:** That's exactly right, Your Honor.

20 **THE COURT:** So that's -- you know, and I do think,
21 Mr. Bigelow, like I -- it seemed to me like if you thought
22 they misstated the law, right -- you get to speak last. And,
23 you know, I think probably it would seem to me you would have
24 said, "Ladies and gentlemen, they said X." And I've done
25 this several times in trial when I was able to do rebuttal.

1 "Opposing counsel said X, and, ladies and gentlemen, you're
2 going to hear from the Judge, and listen close. I bet you'll
3 hear the Judge won't say anything like that. So you need to
4 throw out what opposing counsel just said about the law and
5 how it applies," you know.

6 And you didn't do that, and I think that's
7 probably correctly, because I don't think they did enough for
8 you to make that kind of argument.

9 **MR. BIGELOW:** That's fair, Judge.

10 **THE COURT:** All right. Now, let me just make a
11 couple of final points, and then we'll call in the jury.
12 This is from my opinion in Kostic v. United States [sic], 532
13 F. Supp 513-534, Note 27. And I just wanted to note this for
14 the record. The parties assumed jointly -- and this is an
15 assumption in the plaintiff's favor -- that discrimination
16 based on being foreign-born is discrimination based on
17 national origin.

18 That's debatable because, you know, national
19 origin seems to be -- you know, can be interpreted to mean
20 your origin from a particular nation and not just
21 non-American. And, of course, I realize the
22 counterarguments.

23 What I said in Kostic was this: There is
24 authority on the issue of whether a claim of national origin
25 discrimination can be premised on others' misguided belief

1 that the plaintiff belongs to a particular national origin
2 when, in fact, he or she does not. Some authority suggests
3 that the answer is yes, that the claim can be premised on the
4 plaintiff being perceived as, rather than actually, having a
5 particular national origin.

6 And I'm sorry. I teed up that quote by focusing
7 on the wrong thing. That quote goes to Mr. Bigelow's
8 assertion in his brief that discrimination based on perceived
9 rather than actual national origin is actionable under
10 Title VII.

11 And the point that I wanted to make was -- and I
12 researched this pretty thoroughly, I thought, for the Kostic
13 opinion: It wasn't entirely clear that "perceived as" would
14 do the trick, but there is some authority on that. And,
15 therefore, for purposes of Mr. Bigelow's motion, even though
16 he wasn't able to cite binding authority, I have accepted
17 that as true, Mr. Bigelow. It's not entirely clear. There's
18 authority to support it. I accepted it as true for purposes
19 of your motion.

20 Now, the other issue that I started to mention
21 before getting on track -- off track is I started to talk
22 about the other issue which is whether Title VII bars
23 discrimination based on being a foreigner generally rather
24 than being from a particular country.

25 This is, I think, debatable because as a case like

1 *John v. Walmart Stores E, Inc.*, which is an Eastern District
2 of Tennessee case, 2007, Westlaw 3180099 at Star 7, notes:
3 Nothing in Title VII makes it illegal to discriminate on the
4 basis of citizenship or alienage.

5 And then it cites *Espinoza v. Farah Manufacturing*
6 *Co., Inc.*, 414 U.S. 86-95, 1973, noting it would be unlawful
7 for an employer to discriminate against aliens because of
8 race, color, religion, sex, or national origin.

9 The assertion in this particular case is that
10 *Espinoza*, on the same page, supports the notion that
11 immigrant status is an unprotected class, which means if this
12 *John* case is correct and there are other cases that support
13 the notion that immigrant status is not a protected class,
14 that would mean being foreign-born is not a protected class
15 for persons in the U.S. Because if you're foreign-born and
16 you're in the U.S., you are an immigrant. If that's not a
17 protected class, then being a foreigner generally is not a
18 protected class.

19 *John* supports that notion. There are other cases,
20 I've seen a bunch of them.

21 So I think the issue of whether being a foreigner
22 generally makes you a member of a protected class is
23 debatable. Both parties assumed it. I think it's a
24 reasonable assumption. In my case of *Benitez v. Tyson Fresh*
25 *Meats, Inc.*, which regrettably had 151 footnotes, I'm sorry

1 to say, Footnote 91, I talk about my view on this. It's 2022
2 Westlaw 1283087.

3 The -- what I say here is: The Court is inclined
4 to agree with those Courts that have recognized that national
5 origin discrimination includes not just disfavoring a single
6 national group relative to all others, but also favoring one
7 national group such as Americans over all others; and
8 moreover, includes discrimination on the basis of disfavored
9 treatment of foreigners generally.

10 So all I'm doing here at this point is to explain
11 that I do realize that the very premise that both sides
12 adopted, that being not American-born is a protected class,
13 not entirely settled. I've accepted in the past. I find it
14 persuasive. I accepted it here.

15 My prior point just a moment ago was that, again
16 to summarize, that there is authority to support the notion
17 that a plaintiff can have a claim for national origin
18 discrimination even if they're incorrectly perceived as being
19 of the national origin that places them in a protected class.

20 All right. So obviously, Mr. Bigelow's objection
21 to the Court's declination to amend the charge at this late
22 hour is preserved, but I do need to deny it because I think,
23 you know, substantively, it has the problems I had mentioned.
24 I think he doesn't need this remedy for the jury to do what
25 he wants it to be able to do. And I do think it's

1 procedurally too late.

2 All right. Anything else we need to talk about at
3 this time before we bring in the jury?

4 **MR. BIGELOW:** No, Your Honor.

5 **THE COURT:** Nothing? All right.

6 **MS. CARTER:** No, Your Honor.

7 **THE COURT:** We can call in the jury. Thank you.

8 (WHEREUPON, the jury re-entered the courtroom,
9 with matters being heard in open court as follows:)

10 **THE COURT:** All right. Thanks, folks. Please be
11 seated. We got you in here I know an hour after we asked you
12 to report, and I do apologize for that. I think I've said it
13 before, I'll say it again: It's not a reflection that we
14 can't be bothered with being careful with your time. And it
15 doesn't mean that we were rolling in here way too late to
16 start on time because we were up late watching the World
17 Series, you know. It wasn't that, and I do want you to know
18 that. Sometimes things just come up for, you know, the Court
19 and the attorneys to talk about, and you can't always be sure
20 when and how long.

21 So if I'd known we would start at 10:00, I would
22 have told you that. Thank you for your continued attention
23 and service.

24 And at this point, we've come to the point where
25 the Court will provide you the instructions and will

1 additionally explain the verdict form to you. So the -- the
2 way we'll proceed at this time, we'll hand out copies of the
3 jury instructions, which we call the jury charge, for you to
4 read along and follow as I read.

5 Okay. So you've been provided a copy, and,
6 please, if you see fit to do so, read along with me. That
7 can be very helpful. You will have a copy of the jury charge
8 as well as for each of you, a copy of the jury verdict form
9 that can go back with you.

10 I'm going to read the jury charge verbatim until I
11 get to the part about just explaining the jury verdict form.
12 But this isn't a time for me to give a slick presentation.
13 It's just a time to read off the page so that we can ensure
14 that we provide the instructions just as they should be.

15 The Court wants to note that each of you, as I
16 say, has a jury verdict form. As it happens, whoever is the
17 foreperson can use the copy that they got as what will
18 effectively be the original verdict form, the one that will
19 be filled out.

20 All right. So you'll see that we have a cover
21 page and a page that's left intentionally blank and then a
22 Table of Contents. After that, we have page 4, and I will
23 read as close to verbatim as possible the instructions in
24 this packet.

25 (WHEREUPON, the Court read the jury charge and

1 verdict form instructions to the jury. Transcription was not
2 requested. Further proceedings were had, as follows:)

3 **THE COURT:** So that concludes our jury
4 instructions, and at this point, you will be free to head to
5 the jury room. I'll ask you to step down in a minute. We
6 will provide, as I indicated, the advised version of the
7 verdict form. We will be providing also the exhibits to you
8 for your review.

9 And at this time, then, folks may step down and
10 head down to the deliberation room. Thank you.

11 (WHEREUPON, the jury retired to the jury room to
12 deliberate, with the following matters being heard in open
13 court as follows:)

14 **THE COURT:** All right. Thank you. Please be
15 seated. All right. Any objections to the jury charge as
16 read to the jurors?

17 **MR. BIGELOW:** None here, Your Honor.

18 **MS. CARTER:** None here, Your Honor.

19 **THE COURT:** All right. Thank you, counsel.

20 You know, one of the things about being the Judge
21 is, before it's too late, you need to sort of, I think, make
22 tweaks occasionally, and this one is on me. We looked at
23 this jury form. Those last three lines there in the middle
24 of page 2 that I wanted to strike, they were really
25 applicable only to a prior version of the jury verdict form.

1 They need to be just struck because they don't apply to this,
2 and so I'm confident counsel gathered that anyway, but that's
3 what we'll be doing.

4 What I'm going to do is ensure that -- that seven
5 copies of this revised verdict form, which we can distribute
6 at this time, goes in there, and we'll be distributing right
7 now a copy for each of you.

8 Okay. Do we have any logistical matters that we
9 need to take up at this time, since I know that Ms. Jackson
10 is already on top of the cell phone notification situation
11 and I think you're probably aware to be within, say, 15
12 minutes of the courthouse?

13 **MR. BIGELOW:** No logistics.

14 **THE COURT:** Nothing from you, Mr. Bigelow?
15 Counsel?

16 **MS. CARTER:** Nothing, Your Honor.

17 **THE COURT:** All right. We -- okay. Yeah, we'll
18 lock up the courtroom in the meantime, so you're free to
19 leave or take your items as you see fit. And when we get a
20 note from the jury, we'll let you know ASAP, be it a verdict
21 or a question.

22 All right. If nothing further, at this time,
23 we'll stand in recess. Thank you.

24 (Recess 10:50 a.m. to 12:12 p.m.)

25 **THE COURT:** All right. As it happens, we are in

1 receipt of a jury note. And the Court had drafted a proposed
2 answer, so I will read the proposed draft answer which will
3 incorporate the substance of the jury's note:

4 "The Court is in receipt of a note from the jury
5 asking the following question: If possible, may we see the
6 section of Dr. Jackson's deposition which refers to the
7 international's comment?

8 "To this question, the Court provides the
9 following answer: As the Court noted at trial, when a
10 witness's deposition testimony is read at trial, it should be
11 treated just like testimony provided by a witness in the
12 courtroom during the trial.

13 "This means that just as the Court cannot provide
14 a transcript of the testimony of a witness who testified in
15 the courtroom during the trial, the Court cannot provide a
16 transcript of the deposition testimony of a witness that was
17 read at trial."

18 It occurs to me that since -- well, I'm thinking
19 that I want them to know -- I think my answer should reflect
20 that I realize that they're only asking for a small portion
21 of the deposition, but what I'm saying applies even to a
22 small portion.

23 So I'm thinking to this draft, maybe instead, we
24 should say at the end: "The Court cannot provide a
25 transcript of any portion of the deposition testimony of a

1 witness that was read at trial."

2 Does that work?

3 **MR. DALTON:** Yes, Your Honor.

4 **MR. BIGELOW:** I prefer you say that she mentioned
5 internationals twice, but that totally works for me, Your
6 Honor.

7 **THE COURT:** Yeah. Yeah, that's the thing about
8 these answers to questions. If counsel was answering them by
9 themselves, they may provide a very different answer indeed.

10 If that one works -- and I understand that counsel
11 was able to see a draft of the Court's answer and the note
12 itself; is that right?

13 **MR. BIGELOW:** Yes, Your Honor.

14 **THE COURT:** Is that right?

15 **MR. DALTON:** Correct.

16 **THE COURT:** Okay. Good. Then it sounds like
17 we're on the same page, so I'm going to make that small
18 change after the word "of." Before "the deposition," I'm
19 going to add "any portion of." I will sign it and send it
20 back to the jury, and we'll keep you posted and let you know
21 when we get our next note, whatever the purpose of the note
22 may be.

23 All right. If nothing further, thank you. We'll
24 stand in recess.

25 (Recess 12:14 p.m. to 1:19 p.m.)

1 **THE COURT:** I believe that counsel have been
2 informed that we got a note from the jury saying that they
3 have reached a verdict, so unless there is any reason to do
4 otherwise, we will bring them in.

5 Thank you.

6 (WHEREUPON, the jury re-entered the courtroom,
7 with matters being heard in open court as follows:)

8 **THE COURT:** All right. Thanks, folks. Please be
9 seated.

10 Mr. Maxwell, looks like we've received a note from
11 you saying: "Judge Richardson, the jury has reached a
12 verdict." And is that, in fact, the case, the jury has
13 reached a verdict?

14 **JURY FOREPERSON MAXWELL:** It is, Your Honor.

15 **THE COURT:** All right. Thank you, sir. You may
16 hand it to the court security officer.

17 All right. I'm going to read the jury verdict
18 form verbatim, and then I will poll the jury, and then I'll
19 publish the verdict form to counsel.

20 Jury Verdict. We, the jury, answers the Questions
21 submitted by the Court as follows:

22 Questions as to liability. Question 1: Did
23 Plaintiff prove, by a preponderance of the evidence, his
24 general discrimination claim that Defendant discriminated
25 against him by failing to appoint him to the position of

1 Chair of the Department of Mathematical Sciences due in part
2 to (motivated by) his national origin?

3 No.

4 Question 2: Did Plaintiff prove, by a
5 preponderance of the evidence, his general discrimination
6 claim that Defendant discriminated against him by diminishing
7 his options for advancement due in part to (motivated by) his
8 national origin?

9 No.

10 Question 3: Did Plaintiff prove, by a
11 preponderance of the evidence, his general discrimination
12 claim that Defendant discriminated against him by withholding
13 his pay after questioning his signature on certain of his
14 time sheets due in part to (motivated by) his national
15 origin?

16 No.

17 Question 4: Did Plaintiff prove, by a
18 preponderance of the evidence, that he was subjected to a
19 hostile work environment based on his national origin?

20 No.

21 The verdict is signed by the foreperson dated
22 November the 4th, 2022.

23 Now, here is what I'm going to do. I'm going to
24 go juror by juror and ask whether it's your verdict.

25 Mr. Maxwell, is this your verdict?

1 **JURY FOREPERSON MAXWELL:** It is, Your Honor.

2 **THE COURT:** All right. Mr. Michie, is this your
3 verdict?

4 **JUROR MICHIE:** It is, Your Honor.

5 **THE COURT:** Ms. Shockley, is this your verdict?

6 **JUROR SHOCKLEY:** It is, Your Honor.

7 **THE COURT:** Mr. Melcher, is this your verdict?

8 **JUROR MELCHER:** It is, Your Honor.

9 **THE COURT:** And, Mr. Daugherty, is this your
10 verdict?

11 **JUROR DAUGHERTY:** Yes, Your Honor.

12 **THE COURT:** And, Ms. Hobson, is this your verdict?

13 **JUROR HOBSON:** It is, Your Honor.

14 **THE COURT:** And, Ms. Hutchings, is this your
15 verdict?

16 **JUROR HUTCHINGS:** It is, Your Honor.

17 **THE COURT:** All right. Thank you. I will have
18 the verdict form published to counsel tables. Thank you.

19 All right. Mr. Bigelow, is there any reason why
20 this jury cannot be discharged at this time?

21 **MR. BIGELOW:** None, Your Honor.

22 **THE COURT:** All right. And be it Mr. Dalton or
23 Ms. Carter, any reason why the jury cannot be discharged at
24 this time?

25 **MS. CARTER:** No, Your Honor.

1 **MR. DALTON:** No.

2 **THE COURT:** All right. Thank you.

3 All right, folks. Wanted to thank you for your
4 service. You've spent the better part of four days of your
5 life vindicating the plaintiff's and the defendant's right to
6 a jury trial in something that was, of course, very important
7 to each side. And that system doesn't work and these people
8 are unable to have their rights vindicated unless you take
9 your time and set it aside to serve. We're very, very
10 grateful for that.

11 What I would say at this point is as follows: You
12 are welcome to leave as soon as we dismiss you. On the other
13 hand, if you'd be willing to stick around for a few minutes
14 in the jury room, I'd love to come in and extend my thanks;
15 and also, what is important to me particularly in the early
16 days, which we're still in in this courthouse, see what your
17 experience was like in the building. That helps us know how
18 things are going as we do things in terms of jury trials in a
19 somewhat different way in a new building compared to the one
20 that this Court was in since like 1937.

21 And that feedback would be very helpful, and we'd
22 like to know if there are things we can do to improve the
23 juror experience as well.

24 So again, it's not required at all, but if you'd
25 be willing to do that, I'd love to speak with you in just a

1 few minutes.

2 For those that are departing, I believe that we're
3 still doing the process of them checking out in the jury
4 assembly room on the first floor, and you may have your cell
5 phones there as well.

6 So at this time, the jurors may step down, again,
7 with our thanks.

8 (WHEREUPON, the jury was excused from the
9 courtroom and discharged from further service, with the
10 following matters being heard in open court as follows:)

11 **THE COURT:** Thanks. Please be seated. Just a few
12 more things here. And the way these things sometimes go, one
13 side is disappointed and the other side is very satisfied.

14 I want to not keep anyone here longer than is
15 necessary, but I do want to make a couple of comments about
16 the trial. I think the issues here were able to be vetted in
17 an appropriate manner, and the jury has spoken how it's
18 spoken.

19 I wanted to commend counsel for, you know, I think
20 conducting themselves in trial in a civil manner. And I
21 think the other thing is that both sides, it seemed to me,
22 were never really fighting just to fight. They were able to
23 agree on certain things like the initial jury instructions.
24 They didn't seem to be deciding to dig in their heels on
25 something just to make a point, and that was certainly

1 noticed and appreciated by the Court.

2 You know, and I think Mr. Bigelow alluded a few
3 times, and I think as he put it, he was just trying to be
4 nice. The way I would put it from his side, and sometimes
5 from the defense side as well, you know, he was making
6 reasonable accommodations that I think are helpful to the
7 process, so kudos to counsel for that.

8 The other thing I did want to just say, and it's
9 something to keep in mind for future trials: What I saw here
10 was a case where it mattered to the parties whether something
11 had been on an exhibit or a witness list. There were a lot
12 of documents coming up to the witness stand that were not
13 admitted into evidence or offered into evidence, and some of
14 those were not on an exhibit list.

15 And for that reason, because I wasn't sure what
16 some of these documents were doing coming up to the exhibit
17 stand, I wanted to know and keep track of that. I was a bit
18 of a stickler on what was being done with documents, if it
19 wasn't strictly being just offered into evidence.

20 It probably seemed at times like I was being a
21 stickler, but I think it's important for the Court to know,
22 keep everyone clear, if a document that's not just, hey, it's
23 a document being offered for admission, if it's coming up to
24 the witness stand, appropriate for the Court to clarify what
25 it's coming in for and that -- or what it's being used for

1 and to make sure that sort of the process of it being used is
2 reasonably followed.

3 And so that's, I think, important to notice to why
4 this particular trial was a little bit more, in my
5 experience, a little bit more noteworthy in terms of me sort
6 of managing some of the stuff that happened up at the witness
7 stand between the witness and counsel.

8 All right. As I say, the jury has spoken, and I
9 wanted to ask whether anyone anticipated any post-trial
10 motions as to which it would behoove the Court at this time
11 to set a briefing schedule.

12 **MR. BIGELOW:** Just for the record, we ask your
13 judgment notwithstanding the verdict, Your Honor. Just
14 preserve that.

15 **THE COURT:** Just to preserve it. All right. And
16 that -- for preservation purposes, that is -- that is
17 preserved.

18 I would say this: I will deny the motion at this
19 time on the grounds that, you know, the plaintiff presented
20 evidence, and I don't think I have to say whether the
21 evidence was sufficient to support a plaintiff's verdict. I
22 will say there was evidence admitted by the plaintiff that
23 certainly goes towards each of the four counts -- well, four
24 claims. We have three that were general claims of
25 discrimination, one for each of three different adverse

1 employment actions, and then the fourth that was the hostile
2 work environment. So the -- you know, the plaintiff
3 submitted evidence that certainly went towards each of those
4 counts.

5 And without saying, oh, the evidence would have
6 been sufficient, I don't need to speculate about that.

7 I will say that the way the evidence came in, that
8 a reasonable jury could have found that the plaintiff did not
9 meet the burden that the plaintiff bears, even though it's
10 only by a preponderance.

11 And the third element of each of the three general
12 discrimination claims, you know, does require a finding of a
13 particular motivation, particular adverse employment actions
14 motivated by Dr. Jara's national origin being born outside
15 the United States, and a reasonable jury could find it wasn't
16 a motivating factor that each and every motivating factor was
17 something else, and I think a reasonable jury could have
18 found that.

19 On hostile work environment, certainly, there were
20 some things that the plaintiff offered that would go towards
21 a claim like that. On the other hand, a reasonable jury
22 could have found that not all elements were met. I think it
23 could have found that not many of the circumstances that
24 plaintiff thought contributed to a hostile work environment
25 were based on national origin, and that for any that were --

1 Let's put it this way: A reasonable jury could,
2 even if it did find that some instances of unpleasant conduct
3 were based on hostile work environment, a reasonable jury
4 could find it didn't rise to the level of pervasiveness and
5 severity of negative employment experience and ridicule and
6 so forth based on national origin. It didn't have that level
7 of severity and pervasiveness for a jury to find that it
8 resulted in a hostile work environment based on national
9 origin.

10 And again, that's not to say that a reasonable
11 jury could not have gone the other way. It is to say that a
12 reasonable jury could have reached the defense verdict it did
13 on each of the four claims here.

14 All right. Anything further, Mr. Bigelow?

15 **MR. BIGELOW:** Nothing here, Your Honor.

16 **THE COURT:** All right. Thank you.

17 Counsel?

18 **MR. DALTON:** Thank you.

19 **MS. CARTER:** Thank you.

20 **THE COURT:** All right. Thank you, counsel. And
21 this matter, I will note, will be at the point where the
22 Court will enter a judgment on the jury verdict in the
23 forthcoming days, so you can look for that in terms of the
24 documentation of this case and how it was terminated.

25 Yes, Mr. Bigelow?

1 **MR. BIGELOW:** No, I'm just listening to
2 Your Honor.

3 **THE COURT:** Okay, gotcha. Just standing up.
4 Okay.

5 Again, counsel, I am gratified to say that I think
6 we were able to give each side its day in court and allow the
7 jury to speak, and that's our system.

8 All right. Thank you, counsel. We stand in
9 recess.

10 (WHEREUPON, the foregoing proceedings were
11 concluded at 1:34 p.m.)
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1 REPORTER'S CERTIFICATE

2
3 I, Deborah K. Watson, Official Court Reporter for
4 the United States District Court for the Middle District of
5 Tennessee, with offices at Nashville, do hereby certify:

6 That I reported on the Stenograph machine the
7 proceedings held in open court on November 4, 2022, in the
8 matter of PATRICIO JARA vs. TENNESSEE STATE UNIVERSITY, Case
9 No. 3:20-cv-00131; that said proceedings in connection with
10 the hearing were reduced to typewritten form by me; and that
11 the foregoing transcript (Trial Volume IV of IV, pages 1
12 through 45) is a true and accurate record of said
13 proceedings.

14 This the 11th day of February, 2023.

15
16 /s/ Deborah K. Watson
17 DEBORAH K. WATSON, RPR, CRR
18 Official Court Reporter
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